RECORD AND BRIEFS

FILED
APR 24 2017
OFFICE OF THE CLERK

No. 16-1161

In the
Supreme Court of the United States

BEVERLY R. GILL, et al.,

Appellants,

v.

WILLIAM WHITFORD, et al.,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF FOR *AMICI CURIAE* WISCONSIN STATE SENATE AND WISCONSIN STATE ASSEMBLY IN SUPPORT OF APPELLANTS

KEVIN ST. JOHN
BELL GIFTOS
ST. JOHN LLP
5325 Wall Street
Suite 2200
Madison, WI 53718

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

April 24, 2017

TABLE OF CONTENTS

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION 4

I. The Decision Below Will Produce Unprecedented Federal Intervention In The State Redistricting Process 4

II. The Decision Below Rests On A Distorted View Of Electoral Politics And Representative Democracy 11

A. The Constitution Does Not Guarantee Proportional Representation 11

B. Voters Who Support Losing Candidates Are Not Deprived of Representation or Access to the Political Process 16

C. Party Affiliation Is Not an Immutable Characteristic 19

III. The Decision Below Fails To Adequately Account For Wisconsin's Political Geography .. 21

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Ala. Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 5

Baldus v. Members of Wis. Gov't Accountability Bd.,
849 F. Supp. 2d 840 (E.D. Wis. 2012) 6, 13, 15

Bethune-Hill v. Va. State Bd. of Elections,
137 S. Ct. 788 (2017) 5, 9

Bush v. Vera,
517 U.S. 952 (1996) 10

City of Mobile v. Bolden,
446 U.S. 55 (1980) 17, 18

Davis v. Bandemer,
478 U.S. 109 (1986) ..... *passim*

Democratic Party v. Wisconsin,
450 U.S. 107 (1981) 13

Evenwel v. Abbott,
136 S. Ct. 1120 (2016) 12

Gaffney v. Cummings,
412 U.S. 735 (1973) 4, 10

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 5

Growe v. Emison,
507 U.S. 25 (1993) 4, 23

Jensen v. Wis. Elections Bd.,
639 N.W.2d 537 (Wis. 2002) 4, 5, 6, 8

Perry v. Perez,
565 U.S. 388 (2012) 9

Reynolds v. Sims,
377 U.S. 533 (1964) 5, 8

Shaw v. Reno,
509 U.S. 630 (1993) 16

State v. Fitzgerald,
798 N.W.2d 436 (Wis. 2011) 14

Thornburg v. Gingles,
478 U.S. 30 (1986) 5

Vieth v. Jubelirer,
541 U.S. 267 (2004) ..... *passim*

Vieth v. Pennsylvania,
188 F. Supp. 2d 532 (M.D. Pa. 2002) 20

Whitcomb v. Chavis,
403 U.S. 124 (1971) 16, 17

Constitutional Provisions

Wis. Const. art. IV, §3 8

Wis. Const. art. IV, §4 5

Wis. Const. art. IV, §5 5

Other Authorities

Jason Stein, *Assembly Speaker Mike Sheridan acknowledges dating lobbyist*,
Wisconsin State Journal (Feb. 2, 2010),
http://bit.ly/2oEwNyK 14

Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*,
33 UCLA L. Rev. 1 (1985) 15

Nathaniel Persily, *In Defense of Foxes Guarding Henhouses*,
116 Harv. L. Rev. 649 (2002) 8, 9

Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 Stan. L. Rev. 731 (1998) 8, 9

STATEMENT OF INTEREST[1]

Amici are the legislative bodies to which the Wisconsin Constitution assigns the task of drawing state and federal legislative districts. Wis. Const. art IV, §3. As the Wisconsin legislature, *amici* thus have an acute interest in defending the constitutionality of the districting map challenged here. The legislature also has an acute interest in ensuring that the task of redistricting remains, as the people of Wisconsin intended, with the legislature, not the judiciary. Finally, as the body responsible for representing constituents throughout the State, the legislature is uniquely well-positioned to explain the State's history, geography, and politics, and the myriad ways in which the decision below distorts the nature of representative democracy in Wisconsin.

SUMMARY OF ARGUMENT

For decades, the decennial task of redistricting in Wisconsin has devolved into a decennial chore of litigation. In the 1980s, 1990s, and 2000s, plaintiffs from one party or another sued in federal court, and in the face of divided government and partisan gridlock, federal judges were forced to impose districting plans for use in state legislative elections. In 2011, the Wisconsin legislature finally was able to overcome those obstacles and enact a politically accountable districting plan that, after a tweak to a single line

---

[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

separating two assembly districts, satisfied all then-extant state and federal requirements. Once again, however, a federal court has intervened, becoming the first court in decades to purport to divine a legal basis to invalidate a districting plan as a partisan gerrymander.

That decision is not only wrong, but dangerously so, as it imposes on legislatures a constitutional requirement so amorphous as to threaten their ability to carry out their constitutionally assigned task of drawing districts. It is already hard enough to draw districts that simultaneously satisfy the competing demands of the myriad state and federal constraints on the districting process. If allowed to stand, the decision below will make it all but impossible for legislatures to perform that task without running afoul of one prohibition or another—or at least without being forced to defend against costly and time-consuming litigation (even litigation brought, as here, years after maps were enacted). That result would serve only to increase the federal judiciary's already-outsized role in the redistricting process, a result that this Court has repeatedly discouraged and that inevitably transfers to federal judges and private litigants a power that the people assigned to elected legislators.

Making matters worse, the standard the district court applied allows plaintiffs to bring partisan gerrymandering claims on a statewide basis instead of proceeding district by district. That is no mere foot fault. That statewide approach not only contravenes this Court's precedents, but is premised on a fundamental misunderstanding of how representative

democracy works in Wisconsin. By assessing the plaintiffs' claims at the statewide level, the court created a right to proportional representation that neither the U.S. Constitution nor the Wisconsin Constitution embraces and incorrectly treated partisan preference as a determinative and immutable characteristic that has little to do with the attractiveness of candidates or the attentiveness of legislators.

Even if statewide gerrymandering claims were viable, the district court's methodology failed to adequately account for the impact of Wisconsin's political geography. Democratic voters in Wisconsin are concentrated in urban areas like Madison and Milwaukee, while Republican voters are dispersed more widely throughout the State. As a result, *any* districting map based on traditional principles like compactness and contiguity (which this map concededly was) will appear to have a pro-Republican bias under the plaintiffs' "efficiency gap" theory. Indeed, the *court-drawn* plans over the past three decades produced the same type of pro-Republican "efficiency gap" as the plan challenged here. If there really is a standard by which courts can adjudicate partisan gerrymandering claims, surely it is not one that treats the natural consequences of political geography as evidence of a plan's unconstitutionality.

The decision below is so profoundly out of step with this Court's jurisprudence—and with decades of lower court decisions rejecting comparable claims—as to warrant summary reversal. At a minimum, the Court should note probable jurisdiction, as a decision that threatens to wreak such havoc on the ability of

state legislatures to fulfill their constitutional responsibility to draw districts readily presents questions sufficiently substantial to warrant this Court's review.

REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION

I. The Decision Below Will Produce Unprecedented Federal Intervention In The State Redistricting Process.

Nearly half a century ago, this Court expressed concern about standards "so difficult to satisfy" that the decennial task of redistricting would be "recurringly removed from legislative hands and performed by federal courts." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). The decision below makes that fear a reality, adding an amorphous prohibition on partisan gerrymandering to the ever-growing list of constraints. In doing so, the decision below wrests control of districting away from the state legislators to whom the state constitution assigns that task, and hands it to federal judges and opportunistic plaintiffs seeking to accomplish in court what they failed to achieve at the ballot box. This Court should not permit such an unwarranted interference in the core sovereign function of redistricting.

1. Even before the decision below, federal courts had taken up "seemingly permanent residency" in the state redistricting process. *Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 540 (Wis. 2002). Although the Constitution leaves States with "primary responsibility for apportionment of their federal congressional and state legislative districts," *Growe v. Emison*, 507 U.S. 25, 34 (1993), this Court has

imposed at least five federal limitations on state redistricting.

Specifically, under this Court's precedents interpreting the Equal Protection Clause and the Voting Rights Act ("VRA"), a state legislature *must* (1) ensure population equality among its districts, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), and must *not*: (2) purposefully discriminate against minority voters, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); (3) dilute the voting strength of sufficiently large and politically cohesive minority groups, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); (4) cause retrogression in minority voting strength in jurisdictions covered by Section 5, *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015); or (5) notwithstanding the VRA's command to consider the impact of district lines on minority voters, allow racial considerations to predominate over traditional districting principles absent a compelling interest, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017).

State legislators not only must reconcile those not-always-harmonious federal requirements, but also must obey state redistricting law. In Wisconsin, state law requires the legislature to draw districts that are "bounded by county, precinct, town or ward lines"; are "in as compact form as practicable"; and "consist of contiguous territory." Wis. Const. art. IV, §4. The legislature also must keep assembly districts intact when drawing senate districts, *id.* §5, and comply with a substantial body of case law governing the redistricting process, *see generally Jensen*, 639 N.W.2d at 543.

The overlap and interplay among and between those rules has contributed to the unfortunate reality that redistricting in Wisconsin is "almost always resolved through litigation rather than legislation." *Id.* at 540. Indeed, every districting cycle since 1972 has included trips to federal court. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 843 (E.D. Wis. 2012). In the 1980 cycle, the governor vetoed the legislature's plan; in the 1990 cycle, another veto threat prevented the legislature from passing a plan; and in the 2000 cycle, no plan materialized because a divided legislature could not overcome partisan gridlock. JS.App.9-11. All three times, plaintiffs filed lawsuits alleging that the prior decade's plan had become unconstitutional, and all three times, federal courts imposed plans of their own design. *Id.*

Then, in 2011, after three decades of litigation and court-drawn plans, a minor miracle occurred: The legislature passed a districting plan ("Act 43") that obtained the governor's approval and, after tweaks to two districts, survived challenges under state law, the VRA, and this Court's racial gerrymandering precedents. That plan, moreover, scrupulously complied with traditional districting criteria and compared favorably to prior court-drawn plans in terms of compactness, municipal splits, and population deviations. JS13. Indeed, the plaintiffs in this case have not claimed that *a single district* failed to comport with traditional districting criteria. JS.App.235.

But not even that once-in-a-generation accomplishment was enough to keep redistricting

under state control. Four years and two election cycles after Act 43's enactment, a group of plaintiffs filed partisan gerrymandering claims in federal court. After trial (and a third election under Act 43), a divided three-judge district court declared that it had divined a workable standard for partisan gerrymandering claims and, applying that standard without any advance warning, invalidated Act 43 as an unconstitutional partisan gerrymander. JS16-18.

That decision, if allowed to stand, would extinguish any last hope for state autonomy in the redistricting process. As difficult as it is for state legislatures to navigate partisan gridlock and legal roadblocks, allowing claims like plaintiffs' to proceed (much less prevail) would make federal-court litigation unavoidable. After all, just as nature abhors a vacuum, "court action that is available tends to be sought." *Vieth v. Jubelirer*, 541 U.S. 267, 300 (2004) (plurality opinion). And given the reality that redistricting is an inherently political task, "there is almost *always* room for an election-impeding lawsuit" alleging excessive partisan motivation for the boundaries of one district or another. *Id.* at 286.

Moreover, the indeterminacy of the district court's test—and of any test attempting to measure whether an inherently partisan body is being "too partisan"—means the outcome of that litigation will inevitably be uncertain, which will incentivize resort to the courts "not just where it is necessary," but wherever it is "in the interest of the seeking party." *Id.* at 300. And such litigation *always* will be in the interest of whichever party finds itself out of power, as "factions that foresee ultimate defeat in the political process"

predictably will "obstruct redistricting in the hope of throwing the enterprise into courts where they may fare better." Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 Stan. L. Rev. 731, 735 (1998).

2. The regular insertion of the judiciary into the state districting process not only would cause delay and bring "partisan enmity" upon the courts, *Vieth*, 541 U.S. at 301, but also would transfer power over redistricting from elected state legislators to unaccountable courts and litigants unhappy with electoral outcomes. That would do far more to undermine than to advance the "fair and effective representation" that redistricting is intended to promote. *Reynolds*, 377 U.S. at 565-66. It is no accident that the Wisconsin Constitution—like that of almost every State—assigns redistricting to the legislative branch. Wis. Const. art. IV, §3. Redistricting is not just about lines on a map; it is a substantive act of policymaking through which legislators "make the tough value-laden decisions as to how communities should be represented," and foster "relationships between representatives and constituents that fit into larger public policy programs." Nathaniel Persily, *In Defense of Foxes Guarding Henhouses*, 116 Harv. L. Rev. 649, 679 (2002).

Because redistricting affects "the political landscape for the ensuing decade and thus public policy for years beyond," it works best when it goes through the same "give-and-take of the legislative process" as any other act of policymaking. *Jensen*, 639 N.W.2d at 540. Legislators know every detail of their

districts and have unique access to their colleagues' collective knowledge, allowing them to undertake the "careful assessment of local conditions" necessary to ensure fair and effective representation. *Bethune-Hill*, 137 S. Ct. at 801. Federal courts, on the other hand, lack the same intimate knowledge of local conditions. Instead, courts must draw districts from a "cold record" of maps and charts, meaning courts unfortunately are far more likely than legislators to unwittingly disrupt cooperative projects or split communities of interest. *See* Persily, *supra*, at 678 n.95.

Redistricting litigation also grants private litigants (and the organizations that fund or control their conduct) outsized control over districting. Courts cannot adjudicate gerrymandering claims until someone files a lawsuit, and even then, must limit their analysis to the challenged aspects of the plan. *See Perry v. Perez*, 565 U.S. 388, 397 (2012). Private litigants decide which districts to challenge, which legal theories to press, and which remedies to propose. Those litigants almost by definition will be dissatisfied with the outcome of the elections that gave rise to the legislative majorities that drew the challenged maps. *See* Karlan, *supra*, at 735. Making matters worse, the procedural safeguards that apply in other types of aggregate litigation are absent from redistricting litigation: There is no opt-out procedure for citizens who prefer the enacted plan, no requirement that litigants' objections to the plan be typical, and no mechanism to force litigants to reveal their motivations or funding sources.

Finally, the threat of partisan gerrymandering claims would have the perverse effect of *increasing* the legislature's attention to partisan concerns. After drawing districts to comply with traditional principles, legislators would have to check their work to see whether the resulting map "favored" one party—a common natural consequence of political geography. *See infra Part III*; *Vieth*, 541 U.S. at 359 (Breyer, J., dissenting). If so, legislators would then be forced to adjust districts on explicitly partisan terms—*i.e.*, to engage in partisan gerrymandering—to undo the plan's naturally occurring "partisan slant." That, of course, would just invite partisan gerrymandering claims from members of the *other* political party, placing state legislatures in the same damned-if-they-do-damned-if-they-don't position they often face when trying to comply with both the VRA and this Court's racial gerrymandering precedents—but without the overriding justification of avoiding racial discrimination. *See Bush v. Vera*, 517 U.S. 952, 977 (1996).

In short, if the decision below stands, the only guarantees are an increased federal role in the state redistricting process and increased uncertainty for state legislatures drawing district lines. This Court's decision to enter "the political thicket" of redistricting to adjudicate one-person, one-vote cases and racial gerrymandering cases "does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 U.S. at 749-50.

II. The Decision Below Rests On A Distorted View Of Electoral Politics And Representative Democracy.

Even assuming some partisan gerrymandering claims might be justiciable when particular districts foreclose any other rational explanation for their bizarre contours, the district court erred by allowing the plaintiffs to pursue their claim at the statewide level. As the jurisdictional statement explains, five Justices in *Vieth* held such statewide claims nonjusticiable. JS21-25. And for good reason: Statewide partisan gerrymandering claims are premised on a legal theory that this Court has repeatedly rejected and on factual assumptions that are inconsistent with how representative democracy works in Wisconsin and across the country.

A. The Constitution Does Not Guarantee Proportional Representation.

The district court's decision is premised on a constitutional right that does not exist. The two measures the court considered were the "entrenchment" test and the "efficiency gap" test, both of which examine the extent to which statewide vote totals for candidates from one party translated into seats for that party in the state legislature as a whole. JS.App.145-77. In the court's view, too large a discrepancy between statewide votes and statewide seats inflicts constitutional harm upon members of the "underrepresented" party. In effect, then, the court concluded that "there is a right to *not* have *dis*proportional representation," which "is tantamount to saying there is a right *to* have proportional

representation." JS.App.272 (Griesbach, J, dissenting).

That approach cannot be reconciled with this Court's precedents. Not only has a majority of the Court rejected statewide partisan gerrymandering claims, JS21-25; the Court's cases "clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality opinion).

The Constitution requires States to implement a "Republican Form of Government," U.S. Const. art. IV, §4, but it otherwise affords States "significant leeway" in deciding how votes cast by their citizens should translate into representation in the state legislature. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1133 (2016) (Thomas, J., concurring). States are thus equally free to adopt a district-based scheme, a proportional representation scheme, or any other apportionment method consistent with a Republican form of government. The differences between systems simply "reflect different conclusions about the proper balance of different elements of a workable democratic government." *Vieth*, 541 U.S. at 358 (Breyer, J., dissenting). The Constitution takes no sides in that debate. By granting plaintiffs relief based on purported disproportionality between votes cast and statewide representation, the decision below enshrines a political theory that the Framers allowed the States to reject.

The difficulties with the decision below are not just theoretical. The assumptions built into the court's analysis do not accord with the realities of representative democracy, in Wisconsin or elsewhere. First, by equating votes for individual candidates with support for a statewide political party, the court assumed that the only factor determining voting behavior is political affiliation. That "is assuredly not true" anywhere, *Vieth*, 541 U.S. at 288—much less in Wisconsin, the quintessential "purple state" where primaries are open and voters "regularly elect comparable numbers of Democrats and Republicans." *Baldus*, 849 F. Supp. 2d at 843; *see Democratic Party v. Wisconsin*, 450 U.S. 107, 110-11 (1981).

Indeed, election results in Wisconsin reveal an electorate that chooses candidates based on their records and positions, not just their political parties. Examples abound of state legislative candidates vastly outperforming the Presidential candidate in their districts. In Assembly District 96, for instance, Republican Lee Nerison has held his seat since 2005 even though his constituents overwhelmingly supported President Obama in 2008 and 2012.[2] In 2012, for example, Nerison earned 59.5% of the two-party vote while Mitt Romney received just 43.6% of the Presidential two-party tally. Likewise, Republican Travis Tranel defeated a Democratic incumbent in District 49 in 2010 and then held his seat in 2012, outperforming Romney by 11 points. Not so coincidentally, both of those legislators have

---

[2] Election results are available at http://elections.wi.gov/elections-voting/results.

crossed party lines on occasion, including by opposing the highly contentious Budget Repair Bill of 2011.[3]

The same dynamic is evident in the districts that have changed hands within the same districting cycle. In District 28, for instance, longtime Republican incumbent Mark Pettis was unseated by Democrat Ann Hraychuck in 2006, who herself was unseated by Republican Eric Severson in 2010. Voters in District 68 elected a Democrat in 2002, a Republican in 2004, a Democrat in 2008, and a Republican in 2010. And this phenomenon is not confined to traditional "swing" districts. The right candidate at the right time can prevail when an incumbent in even the "safest" seat adopts unpopular positions or loses the trust of his constituency. In 2010, for example, Joe Knilans defeated the embattled Speaker of the Assembly,[4] who in 2006 had earned 69.3% of his district's vote and ran unopposed in 2008.

As those results reflect, Wisconsin voters respond to the individual candidates in their districts and their positions on important issues; they do not just blindly support one party or the other. By reducing elections to an "R" or "D" on the ballot, the district court undervalued the discernment of Wisconsin voters and oversimplified the nuances of Wisconsin politics.

---

[3] The Wisconsin Assembly's roll call vote on the Budget Repair Bill is available at http://docs.legis.wisconsin.gov/2011/related/votes/assembly/av0184. For discussion of the controversy surrounding the bill, *see State v. Fitzgerald*, 798 N.W.2d 436, 442-443 (Wis. 2011) (Prosser, J., concurring).

[4] *See* Jason Stein, *Assembly Speaker Mike Sheridan acknowledges dating lobbyist*, Wisconsin State Journal (Feb. 2, 2010), http://bit.ly/2oEwNyK.

Second, with its statewide focus, the district court wrongly assumed that each voter's preference for the Democrat or Republican in her district reflects a preference for *every* Democrat or Republican across the State, and a desire for that party to achieve statewide gains. In reality, voters cast votes for individual candidates in individual districts, "not for a statewide slate of legislative candidates put forward by the parties." *Davis*, 478 U.S. at 159 (O'Connor, J., concurring). There are "separate elections between separate candidates in separate districts, and that is all there is." *Vieth*, 541 U.S. at 289 (quoting Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. Rev. 1, 59-60 (1985)). A voter who generally favors Republicans might vote for the Democratic candidate in her district if that candidate prioritizes issues important to her, or if she finds the Republican candidate too extreme, or for any number of other reasons. And while that voter may prefer to see the Democratic candidate prevail in her district, she may prefer the Republican candidate in other districts, and may prefer a majority-Republican legislature.

As that unremarkable example illustrates, political parties are "big tents" containing voters with widely divergent views about policy, governance, and representation. *Baldus*, 849 F. Supp. 2d at 851. And that does not even account for consistently independent voters, who may prioritize preserving a balance of power in the legislature above whichever candidate they find more attractive in a given election. It thus makes no sense to treat losses by a party's statewide slate of candidates as inflicting harm on

every individual voter who voted for one of those candidates. An individual voter "cannot vote for such candidates," "is not represented by them in any direct sense," and might not support them at all. *Davis*, 478 U.S. at 153 (O'Connor, J., concurring).

B. Voters Who Support Losing Candidates Are Not Deprived of Representation or Access to the Political Process.

The district court's focus on statewide election results also caused it to incorrectly presume that voters who supported losing candidates are deprived of representation in the state legislature. That premise is "antithetical to our system of representative democracy." *Shaw v. Reno*, 509 U.S. 630, 648 (1993). In Wisconsin and across the country, legislators represent *all* of their constituents—not just the ones who voted for them. While a losing candidate's supporters might be "without representation" by their candidate of choice, *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971), courts "cannot presume ... that the candidate elected will entirely ignore the interests of those voters." *Davis*, 478 U.S. at 132. Instead, those voters are "deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Id.* at 132.

Because voters are represented even if they voted for the losing candidate, this Court has rejected equal protection claims that are based merely on the fact "that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice." *Id.* at 131-32. In *Whitcomb*, for instance, this Court

rejected gerrymandering claims filed by minority voters who were submerged within a multi-member district. 403 U.S. at 149-53. While the Court acknowledged that those voters had been unable to elect their candidates of choice, it rejected their claims because they failed to show that they were unable to participate in and influence the political process. *Id.*; *see also City of Mobile v. Bolden*, 446 U.S. 55, 111 n.7 (1980) (Marshall, J., dissenting) ("When all that is proved is mere lack of success at the polls, the Court will not presume that members of a political minority have suffered an impermissible dilution of political power.").

Despite this Court's repeated holdings that plaintiffs must show more than the failure to win elections to prevail on partisan gerrymandering claims, the district court treated election results alone as proof that Democratic voters were denied equal protection. That myopic focus not only contravenes this Court's precedents, but also obscures how legislators serve their constituents and how constituents influence their legislators. Wisconsin voters cast their votes in private, with their choices protected by the sanctity of the ballot box. Those who voted for the losing candidate have as much access to sitting legislators as anyone else, whether they "seek help in dealing with a government agency, to express a view about pending legislation, or to request help in securing funds for repairing a local bridge or extending a state bike trail." JS.App.289 (Griesbach, J., dissenting). The name of the majority party has no bearing on the services that legislators provide their constituents on a day-to-day basis.

Moreover, voters can influence the political process in myriad ways beyond voting for state legislators. If a minority party truly "entrenches" itself in a state legislature, "the majority should be able to elect officials in statewide races—particularly the Governor—who may help to undo the harm that districting has caused the majority's party," *Vieth*, 541 U.S. at 362 (Breyer, J., dissenting), whether by vetoing legislation or by wielding influence in the next round of redistricting. That built-in structural check is far preferable to an intrusive judicial check based on questionable justifications and unadministrable tests. And even apart from elections for statewide office, voters are members of countless political, social, and economic groups that can "bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy." *Bolden*, 446 U.S. at 111 n.7 (Marshall, J., dissenting).

Furthermore, treating all votes cast for the losing candidate as "wasted" ignores the significant influence those votes have on legislative behavior. The premise of plaintiffs' "efficiency gap" theory is that any vote not essential to the election result—*i.e.*, every vote for a losing candidate and any vote for the winning candidate beyond the 50 percent threshold—is a "wasted" vote. JS14. But these so-called "wasted votes" often are determinative of how legislators govern. Votes for the losing candidate in a close race can force the winning candidate to "adopt more moderate, centrist positions" and to be more responsive to independent and swing voters. JS.App.287. Similarly, "wasted" votes for the winning candidate in a landslide allow that candidate to move further from the center, as he will likely be more

concerned about a primary challenge from *within* the party than a threat from the other party. *Id.* None of these votes is truly "wasted," and the district court's failure to account for that reality undermines both its methodology and conclusions.

C. Party Affiliation Is Not an Immutable Characteristic.

Finally, by concluding from the statewide results of two elections that Act 43 will impede the ability of Democratic voters to translate their votes into legislative seats throughout *the entire decade*, the district court failed to recognize that "voters can—and often do—move from one party to the other." *Davis*, 478 U.S. at 156 (O'Connor, J., concurring). Each election cycle, "the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes." *Vieth*, 541 U.S. at 289. In Wisconsin especially, winning elections requires support from independent voters and from members of the other party, and yesterday's votes do not guarantee tomorrow's victories.

Election results in Wisconsin over the past two decades prove the point, as the state legislature has experienced significant intra-decade volatility in partisan balance. After the first election under the districting plan imposed by a federal court in 2002, Republicans held majorities in both chambers of the state legislature. After two more elections—and with no intervening changes in district lines—Republicans had lost control of both chambers, losing three senate seats and 12 assembly seats. Similarly, after the first election under the plan at issue here, Republicans held

18 senate seats and 60 assembly seats. Since then, Republicans have added two senate seats and four assembly seats, again without any change in district lines.

The same shifts are evident at the county level. In 2008, President Obama carried 59 of Wisconsin's 72 counties. In 2016, President Trump carried 60 of Wisconsin's 72 counties—picking up 47 counties that Senator McCain had lost eight years earlier. Thus, in the span of eight years—less than the lifespan of a decennial districting map—nearly two-thirds of Wisconsin's counties flipped their party preference. Voters' party affiliation is simply not set in stone, and seats held by one party can (and do) change hands when effective candidates run effective campaigns.

That lesson applies beyond the borders of Wisconsin, including to the districts this Court considered in *Vieth*. The plaintiffs in *Vieth* alleged that Pennsylvania's congressional plan was "rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republican." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002). But in elections held just two years after this Court found those claims nonjusticiable, a majority of Pennsylvania's congressional seats were held by *Democrats*, with Republicans retaining just eight of the 13 supposedly guaranteed seats. JS.App.243. That result mirrored one that this Court discussed in *Vieth*: In elections held just *five days* after a district court found that North Carolina's system for electing judges unconstitutionally disadvantaged Republican candidates, every single

Republican candidate running for superior court judge was victorious. *Vieth*, 541 U.S. at 287 n.8.

Under the district court's approach, statewide partisan gerrymandering claims would require courts to focus on election results, including by predicting the results of future elections. But without any knowledge about the candidates who will run or the nationwide trends that will prevail, courts adjudicating such claims will be forced to view politics through a purely partisan lens, attributing electoral success solely to party affiliation. It is little surprise that experience has proven such predictions unreliable, as federal judges are ill-suited to the difficult task of political prognostication, and viewing future elections through a lens focused only on parties obscures the more complicated realities of representative democracy.

III. The Decision Below Fails To Adequately Account For Wisconsin's Political Geography.

The district court's analysis also failed to adequately account for the unavoidable effects of Wisconsin's political geography. The "efficiency gap" measurement, which the court treated as "corroborative evidence" of partisan gerrymandering, is calculated by taking the difference between the "wasted" votes cast for each party statewide, and then dividing that figure by the total number of votes cast in the election. JS.App.160-61, 176. The party whose voters cast the fewest "wasted" votes is said to have translated votes into legislative seats more "efficiently" than the other party. JS.App.161. According to the plaintiffs, an efficiency gap of 7% or

more renders a plan presumptively unconstitutional. JS.App.33-34.

Treating all votes for losing candidates and excess votes for winning candidates as "wasted" not only misunderstands how voting affects legislative behavior, *see supra* Part II; it also sets up the Wisconsin legislature for failure because of how voters are dispersed throughout the State. While "Democratic voters are uniquely packed in urban centers like Milwaukee and Madison," JS.App.201, Republicans are more evenly dispersed. Republican-leaning election wards thus tend to be more politically diverse than Democratic-leaning ones. Indeed, while "there are a substantial number of wards that are over eighty percent Democratic," there are "virtually no wards that are similarly Republican." JS.App.200.

Because of those geographic realities, elections in Democratic-leaning districts are more likely to be landslides, and elections in Republican-leaning districts are more likely to be close calls. And not so coincidentally, those two outcomes are precisely the types that result in the most "wasted" votes for Democratic candidates under the plaintiffs' "efficiency gap" theory. When a party wins a seat by a large margin, all the votes for the candidate who would have won with thousands fewer are marked as "wasted," and when a party loses a seat by a small margin, the thousands of votes cast for the candidate who came up short are likewise considered "wasted." As a result, it is nearly impossible to draw districting maps in Wisconsin that comply with traditional districting principles (as required by the state constitution) but

do not result in an "efficiency gap" favoring Republicans.

Indeed, the court-drawn plans Wisconsin used in the past three decades all were intended to be politically neutral, yet all resulted in efficiency gaps favoring Republicans. JS.App.308-09. Most recently, the judge-drawn plan in effect from 2000 to 2010 favored Republicans with an average efficiency gap of 7.6%. JS.App.245. Thus, under the plaintiffs' own test, that *court-drawn* plan was a presumptively unconstitutional partisan gerrymander. The district court attempted to brush that problem aside by noting that court-drawn plans would survive constitutional challenges because they are not drawn with partisan "intent," JS.App.171-72, but that proposed solution turns a truism—that partisan bodies are motivated by political considerations when redistricting, *see Vieth*, 541 U.S. at 285—into an element of a constitutional violation. The fact that legislatures are inherently political bodies is no reason to give federal courts more leeway than state legislatures in drawing districts, at least not if states are to retain "primary responsibility for apportionment of their ... state legislative districts." *Growe*, 507 U.S. at 34 (1993).

Moreover, the plaintiffs' demonstration plan in this case—which their expert tried to design with "an efficiency gap as low to zero as he could get it"—still resulted in a pro-Republican efficiency gap of 2.2%, which increases to 3.89% when adjusted for incumbency effects. JS.App.202-03 & n.355. In other words, the plaintiffs' own expert—operating without the time pressures, partisan battles, or incumbency concerns that typically constrain the redistricting

process—was unable to design a districting plan that did not result in what the efficiency gap theory would label a "pro-Republican bias." JS.App.202.

While the district court acknowledged that Wisconsin's political geography inherently favors Republicans under an "efficiency gap" analysis, it did so only when discussing whether the legislature had a permissible "justification" for its purported over-reliance on politics—*i.e.*, after it already had concluded that Act 43 burdened the representational rights of Democratic voters in Wisconsin. *See* JS.App.176-77. To support that conclusion, the district court highlighted the efficiency gaps of the 2012 and 2014 elections, which were 13% and 10%, respectively. But given the impossibility of creating a districting plan in Wisconsin with an efficiency gap of 0%, the court should have—at a minimum—adjusted those 13% and 10% figures to reflect the natural political geography of the State, which itself was responsible for a 7.6% efficiency gap between 2000 and 2010.

By instead measuring from a baseline of 0%, the court skewed the analysis in a way that inherently disadvantages Republicans. Because even neutral plans produce a pro-Republican efficiency gap above the 7% threshold, passing the efficiency gap test would require Republican legislators to engage in "heroic levels of nonpartisanship" and to draw district lines that *reduce* the naturally occurring Republican advantage. JS.App.245-46 (Griesbach, J., dissenting). Yet if Democrats controlled the state legislature, they could draw the most pro-Democratic plan possible—*e.g.*, the demonstration plan the plaintiffs' expert

submitted in this case—without running afoul of the "efficiency gap" theory. If there really is a workable standard for partisan gerrymandering claims, surely it is not one that would allow only one political party to engage in the "lawful and common practice" of drawing district lines to secure party advantage. *Vieth*, 541 U.S. at 286. Indeed, the minimum threshold for any viable test for identifying partisan gerrymandering is that it should be equally opposed by partisan legislative majorities of both parties and equally welcomed by California Republicans and Utah Democrats. The fact that the district court had to resort to a theory with a built-in partisan bias is a sure sign that if a justiciable test for partisan gerrymandering is out there, it is not that one.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

KEVIN ST. JOHN
BELL GIFTOS
ST. JOHN LLP
5325 Wall Street
Suite 2200
Madison, WI 53718

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

April 24, 2017